MAHMUD ADAM & ORS.

v.

MAT ISMAIL & ANOR.

HIGH COURT MALAYA, KOTA BHÀRU
VOHRAH J
[CIVIL SUIT NO. 50 OF 1980]
20 OCTOBER 1983

CONTRACT: *Agreement to repay bank loan - Whether supported by consideration - Letter to solicitor - Signed by defendant - Plea of non est factum - Whether applicable - Contracts Act 1950, s. 24(a), Rules of the High Court 1980, O. 16 r. 5(1).*

EVIDENCE: *Letter to solicitor - Whether "privileged communication".*

The first and second defendants (DW1 and DW2) who intended to build houses on 32 lots of land registered in their names, granted two powers of attorney to the plaintiffs (PW2, PW3) for the purpose of developing the lots. The powers of attorney allowed the donees to enter into any agreement for the purpose, *inter alia*, of obtaining any loan in respect of the development of the lots. The plaintiff obtained an unsecured loan of RM50,000 from Malayan Banking Berhad, and used it for the purpose of the housing project. The action brought by the plaintiffs was for the repayment of the sum of RM50,000 so advanced for the purposes of the housing project. The plaintiff's claim was that an oral agreement was reached whereby DW1 undertook to repay the bank loan with interest in return for PW2's undertaking to release the housing project to the defendants, and that the agreement was corroborated by two letters (P4 & P2). P4 was affixed with the thumb-print of DW2. It was addressed to a firm of advocates and solicitors acknowledging an advance of RM50,000 made by PW1 to her and directing the firm to pay PW1 the sum of RM30,000. P2 was signed by DW1. It stated, *inter alia*, that a cheque for RM20,000 was enclosed in the letter.

Held:

[1] If DW1's undertaking to repay the bank loan with interest was proved to have been in return for PW1's undertaking to release the housing project, then the mutual promises constituted consideration for the existence of an oral agreement, (*K. Murugesu v. Nadarajah* [1980] 2 MLJ 82).

[2] P4 was not a privileged communication between solicitor and client.

[3] The Court was satisfied that DW1 had given the oral undertaking alleged by PW1.

[4] The plea of *non est factum* was not applicable to P4. Any mistake made by a defendant must be as to the nature and purpose of the document and the burden of proving the mistake is on the defendant. *(Saunders v. Anglia Building Society* [1970] 3 All ER 961; *Maria Chia Sook Lan v. Bank of China* [1976] 1 MLJ 49).

[Claim allowed.]

Cases referred to:

K. Murugesu v. Nadarajah [1980] 2 MLJ 82
Saunders v. Anglia Building Society [1970] 3 All ER 961
Maria Chia Sook Lan v. Bank of China [1976] 1 MLJ 49

Legislation referred to:
Contracts Act 1950, s. 24 illus. (a)
Evidence Act 1950, s. 126
Rules of the High Court 1980, O. 16 r. 5(1)

For the plaintiffs - S. E. Rajah; M/s. S. E. Rajah & Co.
For the defendants - C. Jegathesan; M/s Rithauddeen & Aziz

JUDGMENT

Vohrah J:

The first plaintiff (PW2) and the second plaintiff (PW3) are advocates and solicitors practising in Kota Bahru whilst the third plaintiff (PW1) is a businessman. The first defendant (DW1) is the registered owner of 2 lots of land in Kubang Kerian, Kota Bahru, Kelantan, and the husband of the second defendant (DW2) who herself is the registered owner of 30 lots of land in the same area. The plaintiffs claim the sum of RM50,000 together with interest from the defendants for various sums advanced to them in respect of housing project in Kubang Kerian in which they all participated.

The following facts have either been proved or are undisputed. DW1 and DW2, who were the registered proprietors of these 32 lots of land, intended to build houses thereon and in pursuance of this intention DW1 sought the assistance of PW1 who then approached an architect, got plans for the houses drawn up by the architect and obtained the necessary approvals from the relevant authorities for the supply of electricity and water to these houses. In the beginning only five prospective house-buyers were found and it was accordingly decided to build just five houses whereupon a contractor known locally as "Mohd. Amin" (PW6) was engaged for the purpose solely of constructing the building as all materials were to be provided by DW1. By the end of 1974 the five houses were in various stages of completion. In this regard PW1 acted in collaboration with DW1 who also acted on behalf of his wife DW2. In early 1975 when PW1 and DW1 were running out of or had run out of funds they went to see PW2 in his capacity as a solicitor and all three of them had a discussion of the housing project resulting in PW2 contacting PW3, who was then the Timbalan Menteri Besar of Kelantan, in order to enlist his assistance in obtaining a bank loan. On 6 March, 1975 the two powers of attorney, AB.2-5 and AB.7-10, were prepared. AB.2-5 was given by DW1 to PW1, PW2 and PW3 jointly whereas AB. 7-10 was given by DW2 to four individuals jointly, namely PW1, PW2, PW3 and her husband DW1. Both these powers of attorney were given for the purpose of carrying out the housing project and allowed the donees to "enter into any agreement for the purpose of leasing, charging, mortgaging or developing the said lands and the said sub-lots and for such purpose to enter into any load transaction in respect of the same." The plaintiffs then obtained an unsecured loan of RM50,000 from the Kota Bahru branch of Malayan Banking Berhad from which amount the following sums totalling RM49,575 were paid out within matter of a few months to:

(i)PW6	RM 34,000
(ii)PW1	18,500
(iii)Haji Ismail bin Awang Lah (PW5)	795
(iv)DW1	4,000
(v)Registrar of Companies	2,280

The sum of RM2,280 was paid to the Registrar of Companies as the fee for the incorporation of Tunasbena which was set up following the visit by PW1 and PW2 to the Manager of Malaysia Building Society Berhad (MBSB) at Kuantan when they were informed that any application for a loan could only be considered upon the establishment of a limited company's obtaining a developer's licence and a permit for advertisement. A company was duly incorporated on 9 July 1975 called "Tunasbena Sdn. Berhad" (Tunasbena) and its five founding subscribing members were PW1, PW2, PW3, DW1 and DW1's son, Masood bin Mat, all of whom had one share each in the company. PW1 then proceeded to the Ministry of Housing in Kuala Lumpur to find out how the developer's licence could be obtained. There he was informed that a deposit of RM100,000 had to be furnished. As this was a lot of money to raise he approached the Urban Development Authority (UDA) in Kuala Lumpur in order to get it involved in a joint venture with Tunasbena. Apparently before these overtures for the joint venture could be completed by PW1, DW1 handed the housing project to one Jaafar bin Razak because funds were not forthcoming from the plaintiffs.

In *K. Murugesu v. Nadarajah* [1980] 2 MLJ 82 the appellant had agreed to sell a house to the respondent for RM26,00. The respondent obtained an order for specific performance of the agreement and the appellant appealed. At the appeal Counsel for the appellant argued that there was no consideration for the offer to sell and the agreement accordingly was void as being without consideration. The Court however held that on the basis of illustration (a) to s. 24 of the Contracts Act 1950 consideration can consists of mutual promises and dismissed the appeal. Chang Min Tat F.J. at page 83 had this to say:

> The agreement must be seen to be a case of executory consideration. A promise is made by one party in return for a promise made by the other; in such a case each promise is the consideration for the other. "A promise made without a consideration is void. But where there is a promise against a promise, one promise is consideration of the other because each may have his action against the other for non-performance;' per Holt C.J. in *Harrison v. Cage* [1698] 12 Mod. 214). The rule that consideration can consist of mutual promises is now too well established to be questioned.

I therefore agree with the contention of Counsel for the plaintiffs that if the undertaking of DW1 to repay the bank loan with interest was in return for PW2's undertaking to release the housing project to a third person then the mutual promises, if proved, constitute consideration for the existence of an oral agreement.

It is the plaintiffs' case that whilst negotiations were being undertaken with UDA the defendants were growing impatient and wanted to pass the housing project over to Jaafar bin Razak and it was then that the fresh oral agreement was reached whereby the defendants agreed to repay the plaintiff's unsecured bank loan together with interest in consideration of the plaintiffs' releasing the housing project to the defendants which agreement, they contend, is corroborated by two letters (See P4 and P2) which taken together, they also contend, constitute an account stated.

The defendants have pleaded *non est factum* in respect of P4 and aver that the cheque in the sum of RM20,000, enclosed in the letter P2 which DW1 admitted he signed and which was addressed to PW2, was in fact compensation made "purely out of goodwill." The defendants have further pleaded that P4 is "privileged communication" between solicitor and client and contend that under s. 126 of the Evidence Act 1950 it is not admissible in evidence. After a trial within a trial I ruled that P4 which was sent to Messrs. Dzaiddin and Company by DW2 was not sent to them in the course and for the purpose of their employment as advocates by or on behalf of DW2 or in any of the situations envisaged by that section and was therefore admissible.

On the basis of the oral and documentary evidence admitted, the main issue I have to decide on the pleadings, in view of the abandonment of paragraphs 4 and 6 of the amended statement of claim by the plaintiffs and the point made by Counsel for the plaintiffs in his written submission that the plaintiffs are relying wholly on the oral contract to repay the loan together with interest as their cause of action, is whether an oral undertaking was given by the defendants to the plaintiffs to repay the loan together with interest owing to the bank in consideration of the plaintiffs' releasing the housing project to the defendants for the expeditious fulfilment of the housing project by a third party.

PW1's evidence was as follows. The bank loan of RM50,000 was taken in the names of PW2, PW3 and himself for the purpose of paying the contractor PW6 and of repaying loans which had been incurred in the building of the five houses in the form of reimbursements for work already done. When this sum ran out in a matter of two or three months approaches were made to MBSB and UDA for financial assistance. It was whilst he was having negotiations with UDA for the purpose of getting UDA involved with Tunasbena in a joint venture so that UDA's developers's licence could be used that the defendants complained about the housing project being held up and hinted that they had another party who could take over the housing project. In the result he (PW1) and DW1 visited PW2 in his office in 1976 and informed him that DW1 proposed to hand over the housing project to Jaafar bin Razak. At this meeting PW1 and PW2 agreed to DW1's proposal on condition that DW1 repaid the loan together with interest and DW1 expressed agreement. Some time in 1979 or 1980 DW1 gave PW2 a cheque for the sum of RM20,000 made out by Jaafar bin Razak and when he subsequently met the defendant with regard to the repayment of the balance of the loan DW1 stated that he would do so upon the completion of the housing project. However in 1980 DW1 informed him that he had fallen out with Jaafar bin Razak and that he would not allow Jaafar bin Razak to carry on with the housing project after the completion of ten houses. DW1 then asked him to find another person who could continue with the housing project. PW1 thereafter found a friend named Anuar bin Embong who had a company called "Anuar and Company" to fill in and this company is now handling the scheme. PW1's purpose in getting this company to carry on the housing project was to secure completion of the housing project by the building of the remaining 20 houses in the expectation that the defendants would then repay the loan but all to no avail. Accordingly PW2 and PW3 demanded repayment of the loan by a letter dated 22 July 1979 (See AB.14) addressed to DW2 with a copy of it extended to Jaafar bin Razak, both these letters having been sent to the respective addresses by A.R. registered post. The certified English translation of this letter reads:

A.R. Registered

Messrs Mahmood Adam dan Wan Ismail
Advocates and Solicitors.

Taman Sri Laksamana
Jalan Mahmood
Kota Bahru Kelantan
22nd July, 1979.

Our Reference: MA. CIV/F/94/75,
Your Reference:

Hajjah Eshah binti Kadir,
Kampong Taman Pulong,
Jalan Cik Gu Hamid,
Kubang Kerian,
KOTA BAHRU, KELANTAN.

Madam,

This is to inform you that we the undersigned and Encik Ahmad Johari, who together with us borrowed a sum of fifty thousand dollars (RM50,000) plus interest to develop your land which is now known as Taman Pulong, Kubang Kerian, Kota Bahru shall take Court proceedings against you if you do not make full payment of the said loan plus interest to us or directly to Malayan Banking Berhad Kota Bahru vide A/C 4-214.

We shall take Court proceedings for the following reasons:-

1. The sum of fifty thousand dollars (RM50,000) was borrowed by us for yourself, your husband Mat bin Ismail (I.C. No: 3270914) and your son Maso'd bin Mat (I.C. No.484633) to develop the building of houses on your land for sale.

2. You had admitted by evidence and witnesses that all that sum of money was used for the said housing project on your said land.

3. Your husband and your son Maso'd bin Mat had formed a company named TUNASBENA Limited Company together with us with the purpose to develop your land.

4. Because of the reason that TUNASBENA limited Company has never carried out any business instructions to build houses on your land therefore the said loan that we had borrowed and used wholly to build houses on your land is deemed to be a loan to you of which you must repay plus interest which have been charged by the bank.

5. During the time that you wanted to hand over this housing project to Encik Jaafar bin Abd. Razak, the C.G.C. Officer, your partner and husband as well as your son, there were negotiations made between you or your husband with Encik Ahmad Johari that the bank loan at Malayan Banking Berhad shall be paid by you or a company which would be handled or managed by Encik Jaafar bin Abd. Razak (C.G.C.).

6. On 12 December 1973 you wrote to the Legal Firm Ms. Dzaiddin & Co., Kota Bahru admitting the fact that you had borrowed from one of us, i.e. Encik Mahmood bin Adam and that you had said among other things "because of the reason that Encik Mahmood Adam had in the year 1973 managed my housing project ... he had advanced his money in the sum of RM50,000 to me" and instructed that the lawyer do pay RM30,000 to Encik Mahmood Adam because of the loan.

7. On 24 January 1979 Encik Mahmood bin Adam received a letter from Mat bin Ismail your husband (who is also your representative in this housing project and loan that is meant) together with a Kota Bahru Southern Banking Berhad Cheque issued and signed by Encik Jaafar bin Abd. Razak (C.G.C.) from his account No: 1270. The cheque numbered B.073587 and was worth RM20,000 (Not RM30,000 as promised in your letter dated 12 December 1978).

8. Encik Mahmood Adam had on our part made payment to Malayan Banking Berhad with that stated sum and the balance which stands together with interest as at 30 June 1979 is RM56,249.99 (Dollars Fifty Six Thousand Two Hundred and Forty Nine and Cents Ninety Nine Only) with monthly interest per month in the sum of RM553.96. We enclose herewith a photostat copy of the Bank Statement, A/C 4-214 for the month of June 1979 for your perusal.

9. We also remind you that as long as you do not settle the said loan and interest charged by the Bank the interest on the loan will increase and this is your responsibility.

10. Because of the reason that Malayan Banking Berhad is pressing us to settle the said loan, therefore we have to give this NOTICE to you to settle the debt plus interest as soon as possible.

11. If you do not make any reasonable payment to the Bank or to Encik Mahmood Adam within one (1) week from the date of this letter, we shall immediately take Court proceedings against you.

12. We feel rather hard and heavy to take steps to sue you in Court but if you disobey, we have enough evidence and grounds to win this case which might jeopardise your housing project, many people shall be dragged to Court and you may have to pay costs in Court.

13. Therefore it is hoped that this matter shall be settled in goodwill.

This is all.
Yours truly,
Sd.
(Wan Ismail bin Wan Ibrahim)

Yours truly,
Sd.
Mahmood bin Adam
Advocate & Solicitor
Kota Bahru, Kelantan.

Bkr: (1)
cc
Encik Jaafar bin Abd. Razak,
Credit Guarantee Corporation (M) Bhd.,
Tingkat 3, Wisma Iktisad,
Jalan Maju,
Kota Bahru, Kelantan.

Neither DW2 nor Jaafar bin Razak answered this letter. In 1980 the bank instituted proceedings against the plaintiffs for the repayment of the personal loan they had taken in their three joint names by means of an overdraft. At no time did Tunasbena get off the ground and no capital was invested in it but he (PW1) himself had spent RM8,500 and put in a lot of effort in the initial stages of the housing project when the five houses were being built. He opined that DW1 was not included as borrower jointly with the plaintiffs for the overdraft facility because DW1 was not a man of means.

PW2's evidence supported PW1's testimony with regard to the events leading to the obtaining of the loan from the bank for the joint venture. He stated that when the housing project was discussed the understanding was for DW2's 30 empty lots, valued each at RM7,000, to be built on and then to be sold at RM30,000. On the sale of all these houses the defendants would receive a sum consisting of the total value of the land calculated on the basis of the formula RM7,000 x 30 plus the nett profits from the sale of the houses "in proportion to the shares" in Tunasbena. Before Tunasbena was incorporated PW1 had approached him stating that RM50,000 was immediately required to pay the debts arising out of the expenses in respect of the five houses of the housing project and it was his uncle PW3 who secured this sum from the bank on the personal guarantees of the three plaintiffs. Although they had the power of attorney AB.7-10 allowing them to charge DW2's land they did not do so but raised the loan specifically in their joint names because the money was required immediately and the bank had not asked for security by way of any charge. The loan was approved in May, 1975 at 11% interest per annum and the whole loan of RM50,000 was exhausted by July of that year. Then some time in 1978 PW1 and DW1 visited him at his office where DW1 demanded that their joint venture be terminated as he intended to pass the housing project to Jaafar bin Razak. In reply he intimated that he had no right to "cling on" to the land but insisted as "a pre-condition" of and consideration for the release that "the responsibility of repaying the loan to the bank rested wholly on the defendants." DW1

agreed to this. Because he believed DW1 when he undertook to repay the loan plus interest no written agreement was drawn up and the original copies of AB.2-5 and AB.7-10 were handed back to DW1 who indicated that he would get the two powers of attorney revoked but no notice of revocation has yet been received. Since the taking over of the housing project by Jaafar bin Razak he had received letters from the bank demanding repayment of the loan plus interest and on the receipt of each letter he had gone to see DW1 with DW2 sometimes present, and each time DW1 promised unequivocally to pay the loan plus interest upon the completion of all the houses. Then on 12 December 1978 one Ismail bin Hamzah (PW4) delivered to him P4, the certified English translation of which reads:

> Hajjah Eshah bte Kadir,
> Kampong Pulong,
> Kubang Kerian,
> Kota Bharu,
> Kelantan.
> 12hb. Dec. 1978.
>
> Messrs Dzaiddin & Co.,
> Kota Bharu Kelantan.
>
> Dear Sir,
>
> Permission to Enable the Housing Loan of
> Muhammad Awang Lot 2160 Kampong Pulong,
> Kubang Kerian: To be Paid to Encik Mahmud Adam.
>
> This is to inform you that I have sold the above mentioned house to Encik Muhammad bin Awang through his bank loan vide Malayan Banking Wakaf Siku which is handled by your firm. I am also made to understand that the said loan will be issued to me through your firm.
>
> 2. Due to the reason that Encik Mahmud Adam had in the year 1973 handled my housing project but was unsuccessful and he having advanced his money in the sum of RM50,000 to me, therefore I am now allowing your firm to pay out the money which will be received from Muhammad Awang's loan in the sum of RM30,000 and that the balance be paid to me to pay the contractor who completed the house.
>
> That is all.
>
> (Thumb print)
> .....
> Hajjah Eshah bte Kadir

On 13 December 1978 he wrote to Messrs Dzaiddin and Company a letter (See D5) explaining the circumstances of the overdraft and requesting postponement of legal action at the instance of the bank for non-payment of the outstanding loan on the overdraft. As there is no certified English translation of D5 I reproduce the contents of the letter in Bahasa as follows:

> Mahmud bin Adam @
> Mahmud Zuhdi bin Adam,
> d/a Mahmood Adam & Co.,
> Taman Sri Laksamana,
> Jalan Mahmood,
> KOTA BHARU, Kelantan.
>
> 13hb. Disember 1978.
> Tetuan Dzaidding & Co.,
> Peguambela & Peguamcara,
> 252/59. Jalan Sultan Ibrahim,
> Kota Bharu, Kelantan.

Tetuan,

Per: A/A 75/19 sebanyak RM50,000
Baki overdraft sebanyak RM71,815.58
sehingga 28hb. November, 1978.

Dengan hormatnya saya merujuk kepada surat Tetuan bil: DAC/WEE/2717/78 bertarikh 3hb. Disember, 1978 berhubung dengan perkara tersebut diatas.

Ingin saya memaklumkan disini kedudukan yang sebenar tentang pinjaman overdraft sebanyak RM50,000 sebagaimana Account yang tersebut diatas. Walaupun pinjaman overdraft ini dibuat dengan nama saya, Wan Ismail Bin Hj. Ibrahim dan Che Ahmad bin Johari pada hakikatnya kami bertiga adalah sebagai penjamin-penjamin diatas pinjaman ini kerana kesemua jumlah wang yang dipinjam itu telah digunakan untuk membiayai satu projek perumahan di Kampong Kubang Kerian diatas tanah-tanah kepunyaan Encik Mohammed bin Ismail dan isterinya Hajjah Cik Eshah.

Pada mulanya tuan-tuan tanah tersebut telah bersetuju dengan pehak kami untuk sama-sama memajukan tanah-tanah mereka tersebut tetapi malangnya setelah pinjaman overdraft sebanyak RM50,000 telah pun diluluskan oleh pehak pelanggan tetuan didalam tahun 1975 dan sesudah kesemua sekali jumlah pinjaman ini digunakan untuk projek perumahan tersebut dengan tidak disangka-sangka pehak tuan-tuan tanah telah menarik balik projek itu daripada tangan kami dan pada masa itu pehak saya telah mengemukakan masaalah pinjaman ini kepada tuan-tuan tanah dan mereka sanggup untuk membayar balik kepada pelanggan Tetuan jumlah yang terhutang sebanyak RM71,815.58 dan mereka akan menjelaskan dalam tempoh 2 bulan daripada tarikh surat ini.

Olih yang demikian besarlah harapan saya semuga pelanggan Tetuan dapat menerima cadangan saya ini dan menangguhkan tindakan undang-undang yang dicadangkan terhadap kami itu kerana saya berkeyakinan bahawa perkara ini dapat diselesaikan dengan baik.

Saya yang benar

Sd.
.....

P4 was forwarded by him to Messrs. Dzaiddin and Company by letter dated 17 December, 1978 (See P3). As there is also no certified English translation of P3 I reproduce its contents in Bahasa as follows:

Mahmud bin Adam @
Mahmud Zudhi bin Adam,
d/a Mahmood Adam & Co.,
Taman Sri Laksamana,
Jalan Mahmood,
Kota Bharu, Kelantan.

17hb. Disember, 1978.

Tetuan Dzaiddin & Co.,
Peguambela & Peguamcara,
252/59, Jalan Sultan Ibrahim,
Kota Bahru, Kelantan,

Tuan,

Per: A/A 19 sebanyak RM50,000
Baki overdraft sebanyak RM71,815.58
sehingga 28 November, 1978.

Lanjutan kepada surat saya kepada tuan bertarikh 13 Disember, 1978 bersama-sama ini saya sertakan surat bertarikh 12 Disember 1978 daripada Hajjah Eshah bte Kadir iaitu tuan punya tanah bagi Lot 2160 Kampong Palong, Kubang Kerian.

Tuan punya tanah dimana wang overdraft sebanyk RM50,000 telah digunakan untuk projek perumahan telah bersetuju supaya wang pinjaman untuk Encik Muhammad Awang yang akan membeli salah sebuah dari rumah diprojek perumahan tersebut dipotong sebanyak RM30,00 yang mana pembeli tersebut telah memohon pinjaman daripada Malayan Banking melalui Syarikat tuan. Hajjah Eshah bte Kadir melalui suratnya yang tersebut telah mengaku bahawa wang kemudahan overdraft tersebut telah digunakan oleh pehak kami bagi memajukan projek perumahannya yang tersebut.

Oleh sebab itu saya berharap agar tindakan Mahkamah tidak diambil kerana perkara ini dapat diselesaikan secara muhibbah diluar Mahkamah dan memohon supaya ditangguhkan bayaran balik tersebut sehingga pinjaman yang dibuat oleh Encik Muhammad Awang untuk membeli salah sebuah rumah tersebut dikeluarkan.

Sekain, terima kasih.

Yang benar,

Sd.
.....
Bkr:(1)

Then in January 1979 P.W.4 delivered to him the undated letter P.2, the certified English translation of which reads:

Taman Puteri.
Kubang Kerian,
Kota Bharu,
Kelantan.

Encik Mahamood bin Adam,
No. 2897-A,
Jalan Mahmood,
Kota Bharu.

Dear Sir,

Payment of Loan

This is to inform you that the bank has already issued the housing loan for Lot 2160 as have been told to you, since the house has not been fully completed and that there is no water and electricity supply, therefore the payment received is not full.

2. Due to that, I herewith enclose a cheque SBB 073587 in the sum of RM20,000 (Dollars Twenty Thousand Only) as part of what was received.

3. Please sign the carbon copy of this letter on receipt.

That is all.

Yours truly,

Sd.
(Mat bin Ismail)

The cheque referred to in P2 for the sum of RM20,000 was made out in favour of himself and signed by Jaafar bin Razak. He then remitted the cheque to the bank to be credited to the plaintiffs' joint overdraft account. No further payment was made by the defendants and when the bank filed an action against the plaintiffs for the repayment of the loan the

defendants were brought in as third parties and subsequently judgment in default was entered against the defendants for their failure to enter an appearance to the third-party notice. The defendants then applied to set aside the default judgment but their application was dismissed with cost on 30 October, 1982. No appeal was filed by the defendants within the time allowed.

PW4 confirmed that he delivered two letters to PW2, one in December 1978 and the other in January 1979. Both these letters were delivered to PW2 at the request of Jaafar bin Razak, a close friend of his.

The evidence of the other witnesses called to support the plaintiffs' case only confirmed the fact that PW3 was instrumental getting the RM50,000 from the bank as an unsecured loan by means of the overdraft facility in the joint names of the three plaintiffs and that the sums stated to have been paid out were in fact paid out resulting in the depletion of the whole loan. The defence did not dispute the fact that these payments exhausted the whole bank loan within a few months of the loan having been obtained.

The main thrust of the defendants' case seems to be that this was a housing venture wherein the defendants were to provide the land and the plaintiffs the capital for the construction of the houses and as the necessary funds were not forthcoming the venture failed and accordingly the plaintiffs have to assume the financial loss as part of the bargain.

DW1's version of the events is as follows. He first came to know PW1 in 1973 at a time when he and DW2 were intending to build houses on DW2's land. He approached PW1 for his assistance about this time when he had difficulty carrying out the intention to build and had personally abandoned the project. When PW1 came into the picture he had already got the land subdivided into lots with the help of friends. He and PW1 engaged PW6 to build the houses. When his funds ran out PW1 looked around for finance and in the process came up with PW2 and P.W.3. As a result of his being introduced to PW2 and PW3 two powers of attorney were executed. Their contents were explained to him by the solicitor who prepared them and the explanation was that the effect that the power given by him was to allow PW1 to build on DW2's land whilst the power given by DW2 was in favour of three donees, namely PW1, PW2 and himself, to build also on her land. Later he stated in evidence that he himself did not execute any power of attorney and that the solicitor who had attended to them informed him that the land referred to could not be leased or charged and that the land was theirs and the provision of funds would be the responsibility of the plaintiffs. He did not enquire, as to how the funds were to be raised. He admitted receiving a cheque for RM4,000 but explained that this was repayment of a loan which PW1 had taken from him and was not reimbursement for expenses incurred by him in respect of the housing project. After the execution of DW2's power of attorney PW1, PW2 and himself (presumably in purported exercise of that power) built the houses merely up to the extent of the roof-tops being emplaced only on two houses and he was concerned with the delay in construction. PW1 and PW2 intimated that there was no money as they had not been able to secure a loan from MBSB. But PW1 did not inform him of his efforts to get a loan from UDA and was responsible for introducing him to Jaafar bin Razak for the purpose of undertaking the completion of the housing project. He denied that he agreed to repay the loan together with interest to the bank in consideration of the taking over of the project by Jaafar bin Razak. He admitted that he signed P2 and said that the cheque of RM20,000 which was sent therewith was to pay his share and his son's share of the loss incurred in the housing project in accordance with their respective shares in Tanasbena. He signed P2 at the request of Jaafar bin Razak who had told him that it related to a payment of RM20,000 and nothing more. He claimed to have no knowledge of AB.14-16 and denied that the plaintiffs had ever requested the repayment of the RM50,000 together with interest.

DW2 in evidence admitted having affixed her thumb-print on P4 but she stated it was done at the request of Jaafar bin Razak who explained that it was for the purpose of obtaining RM20,000 from one Che Gu Mat Awang for payment to PW2. Jaafar bin Razak did not read the contents of P2 to her before she affixed her thumb-print. The payment was in respect of DW1's share and her son's share of the RM50,000. All the financial aspects of the housing project were dealt with by DW1 although they together had 3 banking accounts - one in her own name, one in the name of DW1 and the third in the joint names of herself and DW1. It was DW1 who would withdraw money from the bank. She did not tell Jaafar bin Razak that she had to consult DW1 first before thumb-printing P4 because Jaafar bin Razak had said, on being asked, that DW1 knew about P4. She denied ever receiving AB.14-16 but admitted she had school-going children staying with her at her house in Kampong Taman Pulong, Jalan Cik Gu Hamid, Kubang Kerian, Kota Bahru at the time the letter was sent by A.R. registered post to that address.

After considering all the evidence and observing all the witnesses, I am satisfied that the plaintiffs have on a balance of probabilities proved their case that DW1 (who, it is not disputed, acted in this housing project both on behalf of himself and as agent of DW2) did give an oral undertaking that he would repay the bank loan of RM50,000 together with its interest on the plaintiffs' agreeing, through PW2, to relinquish their interest in the housing project in favour of Jaafar bin Razak. I believe the version of the plaintiffs as given by PW2 whom I found to be a convincing and forthright witness. Reading the correspondence which passed, as set out in his evidence above, I have no doubt that P2 related to P4 and explained why the sum of only RM20,000 was being paid instead of the proposed deduction of RM30,000 from the bank loan relating to Lot 2160 as, apparently, the bank had not given the full sum because the house had not been fully completed and there was still no supply of water and electricity to it. There was no explanation or mention in P2 that RM20,000 was being paid either by way of compensation or by way of goodwill on account of DW1's share and that of his son in respect of the loss incurred either in the housing project or by Tunasbena. DW2 admitted thumb-printing P.4 although she explained she had been told by Jaafar bin Razak that it was for the purpose of getting RM20,000 from Che Gu Mat Awang to pay PW2 towards "my husband's and son's shares." She did not explain further. If *non est factum* is to apply, it is clear on the authorities (See *Saunders v. Anglia Building Society* [1970] 3 All ER 961 and *Maria Chia Sook Lan v. Bank of China* [1976] 1 MLJ 49) that DW2's mistake must be as to the nature and purpose of the document she thumb-printed and that the burden of proving this mistake rests firmly on the defence which must adduce evidence that is strong and clear. I am not satisfied on the evidence produced by the defence that she, although illiterate, was so mistaken or was as naive as she was made out to be or had been coerced or deceived into thumb-printing. I am not satisfied that she was speaking the truth when she explained her understanding of the nature of P4. I also did not believe her when she said that she did not receive and had no knowledge of AB.14-16 especially bearing in mind that it was sent by A.R. registered post and its receipt must have been acknowledged (even if not by herself personally) at her address (which was clearly written out on the acknowledgement card P1 A) by someone who wrote out the name "I shah" on her behalf. In view of the fact that her teenage school-going children were living with her at the time it is unreasonable to expect the Court to believe that AB.14-16 was not delivered to her or that its contents were not brought to her knowledge. It is also noteworthy that the defence did not deem it fit or necessary to call Jaafar bin Razak in support of its case especially when he figured so prominently in the event culminating in this action.

I am equally not satisfied that DW1 was a truthful witness. At first he admitted making a power of attorney in this matter and later he denied he did so. Further, despite the mention in paragraph 2 of P2 that a cheque for the sum of RM20,000 was enclosed in the letter signed by him and the evidence of PW4 that he delivered what must have been P2 in or about January 1979 to PW2 from Jaafar bin Razak, DW1 quite blatantly stated that it was he himself who delivered the cheque for RM20,000 without an accompanying letter of PW2. Also like DW2 he denied having received AB.14-16 when its inclusion in the agreed bundle of documents must surely estop the defence from denying its existence and the defendants' knowledge of it.

For all the above reasons I am more than satisfied that the plaintiffs have made out their case on a balance of probabilities against the defendants. Counsel for the plaintiffs has drawn my attention to the provisions of O. 16 r. 5(1) of the Rules of the High Court 1980 and to the fact that no appeal has been filed by the defendants since their application to set aside the judgment entered in default of the third-party notice was dismissed. These are technical points which do not affect the substance of the case which I have decided solely on the evidence adduced and I accordingly do not propose deal with these points.

In the result I give judgment for the plaintiffs in respect of their claim for the bank loan in the sum of RM50,000 together with all the bank interest which has accrued upon that sum after taking into account the sum of RM20,000 which had been credited to the plaintiffs' joint overdraft account. The plaintiffs are entitled to their costs.

Also found at [1984] 1 CLJ 99